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No. 910

# In the Supreme Court of the United States

OCTOBER TERM, 1941

A. B. KIRSCHBAUM COMPANY, PETITIONER,

*v.*

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENT

The court below held that the Fair Labor Standards Act of 1938 applies to petitioner's employees, who are engaged in the maintenance and operation of a building whose tenants produce goods for interstate commerce. The two bases of the court's holding are, first, that such employees are engaged in "the production of goods for commerce" (Secs. 6, 7; Pet. 31, 33) since they are employed in a "process or occupation necessary to the production" (Sec. 3 (j); Pet. 27),[1]

[1] The court also held that the elevator operators, since "they carry out one step in the actual transportation of the goods to points outside the state," are directly engaged "in commerce" within the meaning of sections 6 and 7 (R. 219).

and, second, that the employees are not "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" (Sec. 13 (a) (2); Pet. 41).

Although there is a conflict with decisions in three state courts and a federal district court,[1] the only other decision in a federal Circuit Court of Appeals is in accord on both points. *Fleming* v. *Arsenal Building Corp.*, C. C. A. 2d, decided December 30, 1941, pending on petition for writ of certiorari, No. 924, this Term (Pet. 46–53). However, the questions involved are of considerable significance in the application of an important federal statute. They directly affect the status under the Act of an estimated 75,000 custodial and maintenance employees. The questions also concern many additional thousands of employees whose work is asserted to be in a "service establishment," or who are engaged in a variety of processes necessary to the production of goods for interstate or foreign commerce, but who are em-

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[1] *Merryfield* v. *F. M. Hoyt Shoe Corp.*, 41 F. Supp. 794 (D. N. H. 1941); *Killingbeck* v. *Garment Center Capitol*, 359 App. Div. 691, 20 N. Y. S. (2d) 521 (1940); cf. *Cecil* v. *Gradison*, Ct. App. Ohio, 1st Dist., decided Nov. 17, 1941 (Pet. 53–58); *Robinson* v. *Massachusetts Mutual Life Insurance Co.* (Tenn. Sup. Ct., decided Nov. 29, 1941) (Pet. 58–65). In the *Arsenal* case, the Circuit Court of Appeals for the Second Circuit stated that "Obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling" (Pet. 53).

ployed by someone other than the manufacturer. In sum, we submit that the court below has decided two important questions of federal law which have not been but should be settled by this Court.

For the reasons stated, the Government does not oppose the granting of the writ.

Respectfully submitted.

CHARLES FAHY,
*Solicitor General.*

WARNER W. GARDNER,
*Solicitor,*
*United States Department of Labor.*

FEBRUARY 1942.

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